Anwar et al v. Fairfield Greenwich Limited et al Doc. 134

UUNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANWAR, *et al.*,

Plaintiffs,

-against-

FAIRFIELD GREENWICH LIMITED, *et al.*,

Defendants.

This Document Relates To: *Knight Services Holdings Limited et al. v. Fairfield Sentry Limited et al.*, 1:09-cv-02269-VM

Master File No. 09-cv-118 (VM)

Dated: May 11, 2009

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF THE ANWAR PLAINTIFFS FOR APPOINTMENT AS LEAD PLAINTIFFS AND FOR APPROVAL OF LEAD COUNSEL

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I. PRELIMINARY STATEMENT

This memorandum of law is filed by the "Anwar Plaintiffs" as defined below in support of their motion, pursuant to Section 78u-4(a)(3)(B) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §78u-4(a)(3)(B), as amended by Section 21D of the Private Securities Litigation Reform Act (the "PSLRA"), for an order: (a) appointing the Anwar Plaintiffs as Lead Plaintiffs to the extent that such designation is required by the PSLRA in connection with the consolidated proceedings in Master File No. 09-cv-118 (VM) (the "*Anwar* Consolidated Action"); and (b) approving proposed Lead Plaintiffs' selection of Boies, Schiller & Flexner LLP, Wolf Popper LLP, and Lovell Stewart Halebian LLP as Co-Lead Counsel.

In class actions filed under the federal securities laws, the PSLRA requires that courts appoint as lead plaintiff the member or members of the class that have satisfied certain procedural prerequisites and also constitute the "most adequate representative(s)" of the prospective class. As set forth below, the Anwar Plaintiffs invested, and lost, approximately $23.2 million in Fairfield Sentry Limited ("Fairfield Sentry") and Fairfield Sigma Limited ("Fairfield Sigma") during the class period and amply satisfy all of the criteria for selection as lead plaintiff. The Anwar Plaintiffs are believed to have the largest financial interest among persons who are willing to serve as lead plaintiffs. Moreover, the Anwar Plaintiffs and their proposed Co-Lead Counsel already have demonstrated that they can work together effectively to advance the interests of all members of the putative plaintiff class by their vigorous prosecution of the *Anwar* Consolidated Action to date, as described more fully below.

The Anwar Plaintiffs also respectfully request that the Court approve their selection of Lead Counsel in accordance with the PSLRA. Boies, Schiller & Flexner LLP, Wolf Popper

LLP, and Lovell Stewart Halebian LLP have extensive experience in securities class action litigation and are well-qualified to represent the interests of all Class Members. These three firms have been previously appointed by the Court as Interim Co-Lead Counsel for plaintiffs in the *Anwar* Consolidated Action.

II. STATEMENT OF FACTS

The Consolidated Anwar Proceedings

This case arises out of the massive fraudulent Ponzi scheme perpetrated by Bernard L. Madoff ("Madoff") through his investment firm, Bernard L. Madoff Investment Securities, LLC ("BMIS"). The Consolidated Amended Complaint in the *Anwar* Consolidated Action alleges that defendants facilitated this fraud by funneling over $7 billion into Madoff's fraud through their own fraudulent and otherwise wrongful acts in connection with four funds -- Fairfield Sentry, Fairfield Sigma, Greenwich Sentry, L.P., Greenwich Sentry Partners, L.P.

The initial case that was ultimately consolidated into the *Anwar* Consolidated Action was filed in state court on December 19, 2008 and removed by defendants to this Court on January 7, 2009. The *Pacific West* and *Inter-American Trust* complaints were filed in this Court on January 8, 2009 and January 12, 2009, respectively. These cases alleged claims only under state common law, including fraud, breach of fiduciary duty, accounting and restitution. On January 30, 2009, the Court entered the Consolidation Order and Order For Appointment of Interim Co-Lead Counsel, appointing Boies, Schiller & Flexner LLP, Wolf Popper LLP, and Lovell Stewart Halebian LLP as Interim Co-Lead Counsel. The Court determined that the Interim Co-Lead Counsel would:

> [H]ave sole authority over the following maters on behalf of all Plaintiffs: (a) the initiation, response, scheduling, briefing and argument of all motions; (b) the initiation and coordination of Plaintiffs' pretrial activities and plan for trial,

> including but not limited to the scope, order and conduct of all discovery proceedings and of all trial and post-trial proceedings; (c) the delegation of work assignments to other Plaintiffs' counsel as they may deem appropriate; (d) designation of which attorneys may appear at hearings and conferences with the Court; (e) the retention of experts; (f) the timing and substance of any settlement negotiations with Defendants; and (g) other matters concerning the prosecution and/or resolution of the consolidated actions.

Prior to filing their complaints, the Anwar Plaintiffs and their counsel conducted extensive investigations into the Madoff fraud and defendants' involvement in it. Following their appointment as Interim Co-Lead Counsel, the attorneys for the Anwar Plaintiffs negotiated the terms of a Civil Case Management Plan and Scheduling Order ("CMO") with defendants. The negotiated order provided for written discovery on the merits of plaintiffs' claims to begin within weeks after the filing of an amended complaint. Because the parties were unable to agree on whether depositions on merits issues could be taken prior to class certification being decided, that issue was decided by Magistrate Judge Katz, who ruled in favor of plaintiffs and entered the CMO as proffered by plaintiffs.

As provided in the CMO, the *Anwar* Plaintiffs filed a 111-page Consolidated Amended Complaint (the "CAC") on April 24, 2009, which not only incorporated the allegations of the various common-law claims in previously filed actions, but included substantial new factual allegations based on counsel's continuing investigation. On May 7, 2009, at the invitation of Interim Co-Lead Counsel, defendants participated in the Initial Case Management Conference pursuant to Fed. R. Civ. P. Rule 26(f). Based on the conference, discovery will be proceeding in accordance with the CMO and Rule 26.

We also note that on March 13, 2009, the Court denied a request to appoint a fourth co-lead counsel. The Court noted in an endorsed order that it "is not persuaded that additional co-lead counsel services are necessary or in the interest of the proposed class. The interests of the

Laor plaintiffs can be adequately protected by existing lead counsel as part of the consolidated action." [*Laor* Docket Entry No. 4.]

Federal Securities Law Claims

On March 11, 2009, The Knight Services Holdings Limited ("Knight Services") filed a class action complaint containing factual allegations similar to those in the Consolidated Action, but alleging claims under §§ 10(b) and 20(a) of the Exchange Act, 15 U.S.C §§ 78j(b) and 78t, and Rule 10(b)-5 promulgated thereunder. The *Knight Services* complaint was limited both as to time (as it covered only investments within the five-year statute of repose under the Exchange Act, *i.e.*, after March 11, 2004) and the nature of the claims asserted (as it recognized the inability to assert holder claims under the federal securities laws). By order dated March 24, 2009, the Court ordered that *Knight Services* is consolidated into the *Anwar* Consolidated Action.

The *Anwar* CAC did not include any claims for violations of the federal securities laws because Interim Co-Lead Counsel determined that it was not in the best interests of the class to do so. Among the factors considered were the risk of dissipation of assets and the need to move quickly in the litigation, including discovery; the potential application of the discovery stay under the PSLRA; the presence of claims for restitution of hundreds of millions of dollars in fees that defendants collected on the basis of Madoff's fraudulent returns; the statutes of limitations and repose applicable to federal securities claims; the inability to assert holder claims under the federal securities laws; and uncertainty as to whether federal securities claims would add value over the common law claims already asserted.

Notwithstanding the initial appraisal of the federal securities claims by Interim Co-Lead Counsel, if the Anwar Plaintiffs and their counsel are selected as lead plaintiffs and counsel, they will carefully review the federal securities claims and consult with counsel who have filed such claims to make a strategic decision whether it is in the class's best interests to assert federal securities claims, or to proceed in some other fashion. *See, e.g., Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 134-35 (5th Cir. 2005) (the determination whether to bring certain claims in a class action is a strategic decision made by lead plaintiff, and not a basis for finding plaintiff inadequate to represent the class). As fiduciaries for the Class, the Anwar Plaintiffs, if selected as lead plaintiffs, would use their judgment in vigorously prosecuting the claims that are most beneficial and likely to provide relief for the Class.

The Anwar Plaintiffs

The Anwar Plaintiffs are a group of five investors in Fairfield Sentry or Fairfield Sigma who have been named as plaintiffs in the Anwar CAC, specifically:

- Securities & Investment Company Bahrain, whose certification is annexed as Exhibit 1 to the accompanying Declaration of James A. Harrod ("Harrod Decl."), with losses of approximately $2.8 million. *See* CAC ¶23;
- Harel Insurance Company, Ltd, whose certification is annexed as Exhibit 2 to the Harrod Decl., with losses of approximately $5.1 million. *See* CAC ¶20;
- AXA Private Management, with losses of approximately $13.9 million from purchases of Fairfield Sigma. *See* CAC ¶38;[1]
- St. Stephen's School, whose certification is annexed as Exhibit 3 to the Harrod Decl., with losses of approximately $1.17 million from purchases of Fairfield Sigma. *See* CAC ¶39; and
- Pacific West Health Medical Center, Inc. Employees' Retirement Trust, whose certification is annexed as Exhibit 4 to the Harrod Decl., with losses of approximately $200,000. *See* CAC ¶11.

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[1] A certification further reflecting the financial interest of AXA Private Management will be filed promptly.

The Anwar Plaintiffs purchased a total of 75,727 shares in Fairfield Sentry and Fairfield Sigma, suffering total losses of approximately $23.3 million. *See* Harrod Decl. Exhibit 6 (schedule summarizing Anwar Plaintiffs' subscriptions and cost thereof).

III. ARGUMENT

A. THE ANWAR PLAINTIFFS SHOULD BE APPOINTED LEAD PLAINTIFFS

1. The Anwar Plaintiffs Satisfy The Procedural Requirements Of The PSLRA

Under the PSLRA, a person or group of persons seeking to serve as lead plaintiff must fulfill certain procedural prerequisites prior to being appointed to serve in such a capacity. Plaintiffs who commence securities class actions must publish a notice to the class, within twenty days of filing the action, informing class members of the pendency of the action and their right to file a motion for appointment as lead plaintiff. *See* 15 U.S.C. §78u-4(a)(3)(A)(i). Within sixty days after that publication of notice, any person or group of persons who are members of the proposed class may apply to the Court to be appointed as Lead Plaintiffs. *Id*.

On March 11, 2009, the first action alleging violations of federal securities laws was filed, and the initial notice was published over Business Wire, a widely circulated, international, business-oriented wire service. A copy of this notice is attached as Exhibit 5 to the accompanying Harrod Decl. The instant motion is timely because it is filed within sixty days after publication of the initial notice.

2. The Anwar Plaintiffs Meet the Statutory Standard of "Most Adequate Plaintiff"

The PSLRA mandates that, not more than ninety days after publication of the initial notice of pendency, a court shall consider any motion made by any class member, and appoint as

Lead Plaintiff the member(s) of the class that the court determines to be most capable of adequately representing the interests of class members. *See* 15 U.S.C. §78u-4(a)(3)(B). Under the PSLRA, such persons are referred to as the "most adequate plaintiff." *Id.* The statute requires that the most adequate plaintiff is presumed to be the person or group of persons that:

> (aa) has either filed the complaint or made a motion in response to a notice . . .;
> (bb) in the determination of the Court, has the largest financial interest in the relief sought by the class; and
> (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

The Anwar Plaintiffs are entitled to this presumption and are demonstrably the most adequate plaintiffs.

a. The Anwar Plaintiffs Have Made A Timely Motion For Appointment as Lead Plaintiff

The Anwar Plaintiffs have fulfilled the first prong of the test for most adequate plaintiff. Each of the proposed lead plaintiffs has attested to its willingness to serve as representative on behalf of the Class, and has timely filed this motion. *See* Harrod Decl., Exhibits 1 through 4.

b. The Anwar Plaintiffs Are Believed To Have The Largest Financial Interest

The second prong of the test for the "most adequate plaintiff" requires the Court to appoint as lead plaintiff the class member who "has the largest financial interest in the relief sought by the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb).

The Anwar Plaintiffs believe that they have the largest financial interest in the relief sought by the Class. As a group, the Anwar Plaintiffs purchased a total of 75,727 shares of Fairfield Sentry and Fairfield Sigma, and have sustained losses of approximately $23,262,062 as a result of defendants' false and misleading statements. The Anwar Plaintiffs are unaware of any person who has a larger financial interest in the relief sought by the Class. A chart quantifying the losses of the Anwar Plaintiffs is attached as Exhibit 6 to the Harrod Decl. Moreover, even if the Anwar Plaintiffs were not to hold the largest financial interest, they respectfully submit that the Court should exercise its discretion under the PSLRA to appoint them as Lead Plaintiff in view of the extensive work in investigating and prosecuting claims against these defendants that has been undertaken to date by the Anwar Plaintiffs, and the lack of participation of any other potential lead plaintiff movants in the litigation to date.

c. The Anwar Plaintiffs Otherwise Satisfy Rule 23

The PSLRA further requires that the proposed lead plaintiff must also "otherwise satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure." To satisfy Rule 23, persons seeking class certification must demonstrate that: the number of class members is so large that joinder of all class members is impracticable; common issues of law and fact exist and predominate over individual questions; the class representatives are typical of class members; the class representatives will fairly and adequately protect the interests of the class; and a class action is superior to individual actions. *See* Fed. R. Civ. P. 23(a) and (b)(3). For purposes of the appointment of lead plaintiff, however, a movant "must make only a preliminary showing that the adequacy and typicality requirements under Rule 23 have been met." *See In re Fuwei Films Securities Litigation,* No. 07 Civ. 9416 RJS, 2008 WL 216289, *4 (S.D.N.Y. Jan. 24, 2008), citing *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. LaBranche & Co., Inc.*, 229 F.R.D. 395, 412 (S.D.N.Y. 2004).

This is confirmed by the PSLRA, which provides that the presumption in favor of the most adequate plaintiff may be rebutted only upon proof that this individual or group:

> (aa) will not fairly and adequately protect the interest of the class; or
> (bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

15 U.S.C. §78u-4(a)(3)(b)(iii)(II). Consequently, in deciding a motion for appointment of lead plaintiff, inquiry is limited to the typicality and adequacy prongs of Rule 23(a). *See Corwin v. Seizinger*, No. 07 Civ. 6728 DC, 2008 WL 123846, *2 (S.D.N.Y. Jan. 8, 2008) ("As for the requirements of Rule 23, at this stage a proposed lead plaintiff need only make a 'preliminary showing' that it will satisfy the typicality and adequacy requirements of Rule 23.").

(1) The Anwar Plaintiffs Fulfill The Typicality Requirement

The typicality requirement of Rule 23(a)(3) is satisfied when each class member's claims arise from the same course of events and each class member makes similar arguments to prove the defendants' liability. *See Constance Sczesny Trust v. KPMG LLP*, 223 F.R.D. 319, 324 (S.D.N.Y 2004); *see also In re Oxford Health Plans, Inc., Sec. Litig.*, 182 F.R.D. 42, 49 (S.D.N.Y. 1998) ("[Typicality is satisfied where the claims] arise from the same conduct from which the other class members' claims and injuries arise.") citing *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir.1992).

The Anwar Plaintiffs satisfy the typicality requirement because they: (i) purchased shares of Fairfield Sentry and/or Fairfield Sigma during the Class Period; and (ii) suffered damages thereby. Thus, typicality is satisfied since the claims asserted by the Anwar Plaintiffs arise "from the same event or course of conduct that give rise to claims of other class members and the claims are based on the same legal theory." *Walsh v. Northrop Grumman Corp.*, 162 F.R.D. 440, 445 (E.D.N.Y. 1995).

Moreover, the claims of investors in Fairfield Sigma are typical of the claims of investors in Fairfield Sentry because the claims arise out of "the same event or course of conduct." Fairfield Sigma was created solely for the purpose of investing in Fairfield Sentry: Fairfield

Sigma's stated business objective was "to obtain capital appreciation of its assets by purchasing shares in Fairfield Sentry Limited." *See* CAC ¶ 99. Therefore, investors in Fairfield Sigma had the identical investment profile and history as investors in Fairfield Sentry. Further, Fairfield Sentry and Fairfield Sigma shared the same directors, placement agent, investment manager, custodian, administrator, registrar and transfer agent. *See, e.g.,* CAC ¶¶ 48, 53-57, 92, 90, 91.

(2) The Anwar Plaintiffs Fulfill The Adequacy Requirement

Under Rule 23(a)(4), the representative party must also "fairly and adequately protect the interests of the class." Adequacy depends upon the existence of common interests between the class members and the representative party and a showing of a willingness of the representative party to vigorously prosecute the action on behalf of the class members. *In re Espeed, Inc. Sec. Litig.*, 232 F.R.D. 95, 103 (S.D.N.Y. 2005).

Here, the interests of the Anwar Plaintiffs are clearly aligned with the members of the Class, and there is no evidence of any antagonism between their interests and the Class. As shown above, the Anwar Plaintiffs share questions of law and fact with the members of the Class, and its claims are typical of the claims of other Class members. Significantly, the Anwar Plaintiffs have already demonstrated their very substantial commitment to pursuing this action on behalf of the Class, not only by executing Certifications attesting to their willingness to assume the responsibilities of Class representative, but by working cooperatively in actually investigating, filing and prosecuting their claims for over four months, including substantial litigation activity against defendants, such as successfully litigating the terms of the proposed CMO, investigating and preparing initial complaints and the CAC, and initiating discovery activity against defendants with the recent case management conference. *See* pages 2-3, above.

In short, the Anwar Plaintiffs are the victims of the same fraud as all other Class members, and their claims raise similar questions of law and fact. To further their own interests, the Anwar Plaintiffs will necessarily have to advance the interests of all Class members. They have already demonstrated their commitment to vigorously prosecuting claims on behalf of the Class, by retaining counsel experienced in complex class litigation and by the extensive work already undertaken by their attorneys, the Interim Co-Lead Counsel The Anwar Plaintiffs will adequately represent the interests of Class members.

B. THE COURT SHOULD APPROVE THE ANWAR PLAINTIFFS' CHOICE OF COUNSEL

Pursuant to 15 U.S.C. §78u-4(a)(3)(B)(v), the lead plaintiff shall, subject to Court approval, select and retain counsel to represent the class. The proposed Lead Plaintiffs have selected Boies, Schiller & Flexner LLP, Wolf Popper LLP, and Lovell Stewart Halebian LLP as lead counsel to prosecute the action. These three law firms have been highly successful in prosecuting securities fraud class action litigation, as outlined in their firm resumes annexed as exhibits B, C and D to Plaintiffs' Memorandum of law In Support of Motion for Consolidation of All Actions and Appointment of Interim Co-Lead Counsel, dated January 29, 2009. [Docket Entry No. 22] Moreover, the Court has had the opportunity to observe the actual performance of the firms over the past several months in their service as Interim Co-Lead Counsel in the Consolidated Action. *See* pages 2-3, above. Plaintiffs respectfully submit that appointment of these firms as Lead Counsel will provide the Class with the highest caliber of legal representation available.

IV. CONCLUSION

For all of the foregoing reasons, the Anwar Plaintiffs respectfully request that the Court grant their motion for appointment as Lead Plaintiffs and appointment of the counsel they have selected as Lead Counsel for all plaintiffs and Class members in connection with these proceedings.

Dated: May 11, 2009

Respectfully submitted,

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